SEPTEMBER-OCTOBER 1949

Case and Comment

The Lawyers' Magazine—Established 1894

IN THIS ISSUE

Volume 54 **No. 5**

You can get fiduciary bonds *fast* this Hartford way

Phone your local Hartford representative, supply brief, simple data, and you can quickly get any needed form of Fiduciary Bond up to $5,000.

This fast, simplified Hartford bonding procedure enables you to offer your clients all the advantages of corporate suretyship when named in any fiduciary capacity, with all red tape eliminated. There are no lengthy questionnaires for you to complete—nothing for clients to sign.

Only information required are essentials such as the name, address, and amount of estate.

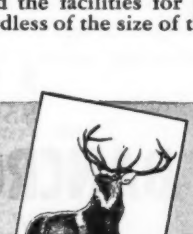
Through this arrangement all obstacles to corporate suretyship for your bonding requirements are eliminated. Your clients can be spared the necessity of asking friends or relatives to become their bondsmen. There is no need for anyone to pledge his property and credit as surety, thereby assuming the risk of an unnecessary loss. Thus embarrassment and personal obligation are avoided and friendly relations protected.

Certainly you will want to know all about this Fiduciary Bonding Plan. Ask your local Hartford Accident and Indemnity Company Agent, or your insurance broker for full details — he'll gladly furnish them without obligation. (In over 5000 communities you can obtain the name and address of the nearest Hartford agent quickly by calling Western Union by number and asking for "Operator 25").

Remember that the Hartford is also prepared to write Fiduciary Bonds *in any amount* with the capacity and the facilities for so doing regardless of the size of the estate.

HARTFORD

HARTFORD FIRE INSURANCE COMPANY
HARTFORD ACCIDENT AND INDEMNITY COMPANY
HARTFORD LIVE STOCK INSURANCE COMPANY
Hartford 15, Connecticut



Year in and year out you'll do well with the Hartford

"Enough Fathom-long Swine"

by MARY HELEN STEVENS

✦

Condensed from
Law Library Journal, February, 1949

THERE shall be two forms of taxation in the Hawaiian kingdom. The one a poll tax to be paid in money, the other a land tax to be paid in swine.

"The amount of poll tax shall be as follows: For a Man, one dollar. For a woman, half a dollar. For a Boy, one-fourth of a dollar. For a Girl, one-eighth of a dollar.

"This is the ratio of taxation for adults and children above 14 years of age. But feeble old men and women shall not be taxed at all. In the back part of the islands where money is difficult to be obtained, Arrow Root will be a suitable substitute . . . Cotton also is another suitable article . . . Sugar is another suitable article; also nets.

"Land tax. There shall be no state, county, town and district tax, but only the following: A large farm—a swine one fathom long. A smaller one—a swine three cubits long. A very small one—a swine one yard long. If not a fathom swine, then 10 dollars. If not a three cubit swine, then 7½ dollars. If not a yard swine, then 5 dollars."

Thus spake Kamehameha III on the 10th day of November in the year of our Lord 1840, quite properly arranging for the support of the government.

It was more than a hundred years after the pronouncements of King Kamehameha III that I first came to the Supreme Court Law Library, to be precise—May 1, 1943. From a fine start, and a library that was "going strong" at the turn of the century, the Supreme Court Law Library, emerging from the depression, was plunged right into the arms of war before it had time to take stock of itself. Marks were evident of the dark days when taxes of the proportion of one fathom long swine were nonexistent and swine three cubits long had become piglets.

When jobs were scarce and positions scarcer, the library had, when the budget permitted a librarian, been placed in the charge of law school graduates studying for the Bar. As soon as the Bar was passed, they turned to more profitable legal work. Consequently the library had been in a constant state of change of librarian. When the

budget did not permit, the library was left in the care of trusties from the prison. With the onslaught of the war, the law students vanished and the library again languished under the care of a prisoner.

The day was beautifully sunny, that first day as I walked past the statute of Kamehameha and entered the venerable edifice known as Aliiolani Hale—the Judiciary Building. Stately with age, the building had grayed with the years so that it looked impressively timeless. The sky was blue, fleecy clouds were playing about, and with that queer twist of weather that is so natural in the Islands and so perplexing to visitors, it was also raining very hard.

Armed with two years experience in a law office and graduation from both a university and a library school of recognized standing, all of which had loomed so large when I made application for the position, I felt it all slowly dwindle into infinitesimal proportions as I surveyed the task before me.

The library was unprepossessing looking. Where the roof had leaked, still too recently for comfort, great scales of plaster and loose paint had peeled off, and ugly trails of former storms were visible.

The walls were a dirty shade of mud, which, dimmed by age and dust, had become an ever dirtier shade of mud. The window trim was an unattractive oyster-white, now long since marred and grimy. The color of the ceiling was by now undeterminable.

Long rows of completely vacant shelves gaped at the beholder at unexpected intervals while state reports were doggedly piled double in other spots. The original arrangement was not easily discernible but whatever it had been, it had long since vanished under the expediency of the moment. Books were shelved wherever there was an empty space reasonably close to where they should be; that is, if one wanted the latest Florida reports, they might be found in either Delaware or Georgia; and Wyoming mingled cozily with Washington and Wisconsin, and occasionally with Illinois, which happened to be, by some trick of arrangement, adjacent.

It was quite clear that several thousand of the volumes needed immediate rebinding and that the place was a paradise for termites and book worms. Crumblings of leather, loose termite dust, and stray covers, long since unattached to their original volumes, sprang from every shelf. On what might have been an attractive lanai (veranda) an overwhelming assortment of broken shutters, old Venetian blinds, and a strange array of implements which later proved to be the rusty parts of two vacuum cleaners lay mingled together in a forlorn heap.

From the mezzanine, an owlish looking youth dressed very simply in a pair of blue dungarees and a white shirt with a number stamped on it surveyed my progress and when I came within hailing distance greeted me with an off-hand: "Hey, there!" followed by: "You ought to see what's up here!"

Climbing the circular turret type balcony steps, one could easily see why not even a faint glimmer of light penetrated the corridor below. If there were empty shelves on the main floor, there were none on the mezzanine. Stacked double-decked, triple-decked, on the floor and in the corners were piles of books of all sorts and conditions; and the wall end was waist deep with debris. If the volumes below had looked somewhat woebegone, those on the balcony were terrific—in more senses than one. To this haven of bookworms and termites was also added a few nests of playful rats. And so on this overloaded balcony, I was introduced to my fellow co-workers—the rats, the bugs, the bookworms, and the prison trusty—Tommy. Of other staff, there was none, either page or janitorial or professional.

Behind this stack of mail was a fish net which Tommy had been making which served as a sort of curtain over the whole. At the end, burrowed in among the rats' nests and debris, Tommy had fixed himself a couch of two soft boxes of paper towels and had arranged a little dugout, equipped with lights, lurid fiction magazines and food. Tommy loved to eat and was forever at it. His adoring friends and relatives would bring him food, send him food, and give him money for food. In the short intervals when he was temporarily out of food, he was suspected of selling books from the library and stray equipment, such as the motor from the electric fan from the archives below, and buying food. In between mouthfuls, he was expected to put the books back on the shelves, open and file the mail, dust the shelves, mop the floor and assist the librarian generally.

Tommy lived in a pleasant world of his own, arranged by himself, whereby every thing paid obeisance to himself. Whatever he wanted, he seemed to acquire, and unless someone objected too strenuously, he retained. Occasionally the law caught up with him and restricted his freedom for a period of time, which bothered him not a whit. It simply saved him the trouble of providing food for himself. Of the numerous prison trusties who followed Tommy, none was so gracious or generous. He would share his food with you, remove your fountain pen and, when you were looking for it, return it with a courtly gesture.

Following Tommy's graduation to the outside world, a variegated group of burglars and pet-

ty thieves followed, who insisted on roaming through the Justices' Chambers, the Board of Health Building and the Territorial office building until the harassed librarian requested "crimes of passion and violence" for a change and was rewarded with two near murderers and a rapist —who proved easier to handle. Included in this group were representatives from all nationalities, the final allotment being natives from the Philippine Islands, who, fresh from the plantations, spoke very little English and had to be painstakingly taught their letters and the sequence of the alphabet in order to have them replace the books on the right shelves. It was at this period that the library blossomed out with a series of brightly colored stars which proved of inestimable value. "Green stars" meant the British section; "blue stars," the law reviews; "red stars," state codes and statutes, and so on. Carefully placed white crosses indicated the exact last name of the authors of textbooks, etc.; otherwise, these got shelved by the editor, the reviser or the title.

Some of the prisoners got a little out of hand, but for the most part they cooperated and seemed, surprisingly enough, to enjoy their work. There was one who chased a pretty young typist one awful morning and upset her completely for the week. There was another who almost embraced one of the secretaries, and there were others who spent hours, with somewhat contemplative expressions, sharpening the very dull knives which they used to open the mail; but in the main, they were good, took pride in their work and proved of invaluable assistance. They have been withdrawn now due to a tragic murder by a pair who roamed loose from one of the ground crews.

The greatest contribution of these trusty prisoners to the law library was in the field of book shifting. Together with Tommy, I set out to make the first readjustment of the book collection. First to get the sets most frequently used near the tables, and then to get Wisconsin, Delaware, and Florida back in their proper sequence and still allow for expansion. Hours of painstaking shifting and aching backs! Books down, books up, books down, books up, and so on until Tommy finally triumphantly produced a radio, feeling that we could manage better to music. I never did find out where the radio came from.

The Supreme Court Justices were energetically furthering the program. From the Chief Justice's report on December 31, 1944, we quote the following:

"Our present librarian is a professional librarian, and she has systematized the arrangements of the contents of the library and is now cataloguing the books, which will greatly improve the library as a work-

ing tool for the use of the court and the attorneys who avail themselves of its facilities. To facilitate this work, I request that funds be made available to enable us to employ a typist to assist the librarian."

At the same time, knowing that it would take practically a whole herd of swine to restore the losses of the depression, the Supreme Court Justices, backed wholeheartedly by several prominent members of the Bar and Mr. Samuel Thorne, law librarian of Yale University who was fortunately stationed out here by the Navy, requested that the book appropriation for the library be doubled for that next biennium. So we received more fathom long and three cubit swine and built up our book collection.

The collection of books was necessarily spotty when I first arrived. Occasionally, a new up-to-date set gleamed like a jewel and certain sections were startlingly modern but of balance there was none. It took years of careful planning and of search before it became well-rounded. The recommendations of Mr. Thorne and Mr. Scott, the very fine lists of Miss Helen Newman and the Chicago Law Institute, and Mr. Miles Price's Catalog of Fifteen Thousand Books for a Law Library played a big part. Law reviews and dealers lists were searched for recommended books, and personal comparisons with outstanding mainland collections were made by the librarian.

On each trip to the mainland the librarian gathered a wealth of worth-while suggestions and feels greatly obligated to the law librarians who so kindly and courteously displayed their latest improvements and newest books. Those oceanic voyages were apt to be rugged during the war years; it look eleven days with a freight convoy to make a trip which now can be done in eleven hours.

The need for at least a typist was readily apparent. Indexes had faded into practical nonexistence. There were sixty drawers of catalog cards which minutely analyzed the contents of certain law reviews, but which had been changed from a usable implement to a hodgepodge of cards by several attempts to experiment with the filing system. I suspected Tommy of exercising his ingenuity by playing fan tan with them at one of the relatively few moments when he was not hungry. There was also a fine start toward a catalog of the books in the library but this had been redone so frequently that it now bore very faint resemblance if any to the books that were on the shelves. It had to be entirely abandoned. Of other indexes "the working tools of the library profession" the less said the better.

The books themselves had wandered. Due to the two entrances, and the fact that the li-

brary had been relegated to the tender mercies of the various "Tommies," there was an extremely lax system about registering the departures and returns of books. This was also stimulated by what is known as a "key system." Practically every lawyer in the Territory had a key set to the library which, until withdrawn, brought down frequent diatribes on the librarian's head from the night watchman because of carelessness in the matter of smoking, burning lights and unlocked doors.

Before I even knew of his existence except in a vague sort of way like you know the President of the United States and his cabinet members, the telephone rang and a clear, convincing voice started me immediately on what proved to be the right track: "This is the attorney general's office calling. The attorney general wanted me to bring you his greetings and let you know that you have quite a balance of unspent money in your book budget. While looking up his, he also ran across yours and thought you might like to know about it. It must be spent or earmarked for spending before the first of July of this year."

No only was there the problem of getting hold of these elusive fathom-long swine, but also of hanging on to them once you got them. It was the first of May and it was necessary then to find out what books would be most needed, what could be bought, and where, and how to get them here and billed before the first of July.

With the war on, we were still in the protective care of the Military Governor who issued series of GENERAL ORDERS from time to time touching on blackout regulations, courts, censorship, where you could go and how long you could stay, etc. and who enforced regulations emanating from many other sources.

Narrowed down to those immediately applicable it was necessary to get permission to bring in packages of any kind larger than eleven pounds per week. Materials came by convoy and might arrive and might not. Blackout hours precluded any possibility of working into the night. In addition, there were interminable forms, forms, forms to be filled out and approved. I still recall the puzzled look on the face of the clerk who signed these approvals as he examined my list of text books and statutes:

"You can bring in these books all right," he said gently, "but we can't let you bring in these statues. I don't think WAR is the time to go in for art. We need that shipping space for food."

Properly rebuked, I changed the wording of the request to read compilations of state laws.

The Trial of Thomas Muir

By ARTHUR E. SUTHERLAND, JR.
Professor of Law, Cornell Law School

Extracted from
Cornell Law Quarterly, Spring, 1949

CITIZEN Tom Paine's writings were as generally known, and as respectively admired, or condemned, in England in 1793 as his earlier works had been in the United States nearly twenty years before. And of the thousands who have read Burns' "For a' that and a' that," how many realize that it was written on the same theme as Paine's *Rights of Man?*

"It's coming yet for a' that,
That man to man, the world o'er,
Shall brithers be for a' that."

And who now thinks, when he recites Scots, "wha hae wi' Wallace Bled," that Burns composed it in September 1793 on hearing the news of the conviction of Thomas Muir for sedition, before the High Court of Justiciary at Edinburgh?

Muir was a young Scots lawyer, whose tradesman father was sufficiently prosperous to send his boy to Glasgow University, from which he was expelled for writing squibs against the professors! He became a member of the Faculty of Advocates, and took an active part in the movement for parliamentary reform. At the same time he was cautious in his speeches, deprecated violence and urged reform by act of Parliament only. His worst sin appears to have been the recommendation of Tom Paine's *Rights of Man* to friends and relatives. He had also taken up the cause of the United Irishmen, and was in touch with the Corresponding Societies in England. In the fall of 1792 he had been speaking at meetings in the industrial districts in Scotland, criticizing the government, and comparing it disadvantageously to that of the French. He had a considerable following among young factory hands, and if he did not actually present a clear and present danger to the national welfare of Britain, he was certainly a menace to the political management of Henry Dundas who delivered the Scots vote for Pitt. Muir was brought by the authorities before the Sheriff-deputy of Edinburgh where he signed a statement; but he was not otherwise interfered with. However, he left for France immediately thereafter—only a few

days before the execution of the King and the outbreak of active war between France and England. In his absence he was indicted in Scotland for sedition. He sailed from France with a passport and a passage for the United States, but turned up in Ireland late in July, where he was recognized and arrested.

Muir's trial by jury opened at Edinburgh in 1793, before the High Court of Justiciary. On the bench were the Lord Justice Clerk, Lord Braxfield, (who was to be the grim Weir of Hermiston in Stevenson's novel a century later), and four lords commissioners of justiciary. Braxfield was a conspicuous judicial figure. He was of relatively humble descent, but went to the grammar school at Lanark, to Edinburgh University, and in due time became a busy member of the Scottish bar, noted for his capacity to stand drink and for his fanatic adherence to the Toryism of Henry Dundas. Lord Braxfield considered it a duty and a privilege to put down radicalism and he let this be known from the bench. In 1794 he presided at the trial of Joseph Gerrald for sedition; the defendant said at one point that Christ himself was a reformer. Braxfield responded, "Muckle he made o' that; he was hangit."

Muir's indictment for sedition, principally "in that he did . . . wickedly and feloniously distribute . . . a number of seditious and inflammatory writings or pamphlets; particularly a book or pamphlet entitled "The Works of Thomas Paine, Esq." The indictment quoted Paine's books as saying:

"In England, a king hath little more to do than to make war, and to give away places; which in plain terms, is to impoverish the nation, and set it together by the ears. A pretty business indeed for a man to be allowed eight hundred thousand pounds sterling a year for, and worshipped into the bargain! Of more worth is one honest man to society, and in the sight of God, than all the crowned ruffians that ever lived."

Muir's trial opened with a reading of the entire indictment, which takes up six pages of small print in Howell's State Trials. He orally pleaded not guilty, and announced that he would be his own counsel.

In every Scots criminal trial, the Court, as a matter of course, first passed on the sufficiency of the indictment. The four lords commissioners (associate justices) "agreed to find the libel relevant to infer the pains of law." Braxfield, the Lord Justice Clerk, let himself go a little. He said:

"The crime here charged, is sedition; and that crime is aggravated according to its tendency; the tendency here is plainly to overturn our present happy constitution—the happiest, the best, and the most noble constitution in the world, and I do not believe it possible to make a

This book is different

Announcing

A sparklingly fresh edition of

Henderson's Introduction to Income Taxation

by **JAMES M. HENDERSON,** author of the prior edition, formerly in charge of supplementation of Mertens' "Law of Federal Income Taxation," author of numerous works on Federal Practice and Procedure and the Law of Corporations.

HERE is a different and indispensable aid to successful income tax practice. The field of the tax manual is already well covered. Mr. Henderson's "Introduction" shows you the basic thinking and philosophy that is the foundation of the income tax law, the regulations, the decisions and the manuals.

THIS book not only enables you to know what the answer is, or probably will be, but it goes further and helps you understand WHY the answer is that way. It helps you not only to know the rule but also the REASON for the rule. Fortified by this perspective of taxation, you can be more ready to tell your clients clearly what to do and how to do it.

SHOULD your client come to you with a deficiency assessment, the understanding acquired from this book will help you decide whether it is worth while to file a protest and incur the heavy cost of a prolonged argument or whether it is best to pay the assessment and "call it a day."

OFFICES which are beginning or expanding their income tax practice as well as established tax specialists will all find help in this book in a form that few have attempted and none have accomplished so well as this experienced tax author.

Price $7.50 — Order your copy today

The Lawyers Co-operative Publishing Company
ROCHESTER 3, N. Y.

better;—and the books which this gentleman has circulated have a tendency to make the people believe that the government of this country is venal and corrupt, and thereby to excite rebellion."

His lordship, therefore, agreed with his associates in sustaining the indictment.

The prisoner had equally poor luck on the selection of the jury. When Captain John Inglis of Auchindinny was called he said that as a government servant he preferred not to serve, "that he did not consider it as proper that Mr. Muir should be tried by a jury composed of servants of government." The court told him that there was no impropriety in his serving. Muir objected to the first five jurymen on the ground that they belonged to the Goldsmiths' Hall Association, whose members had voted to exclude Muir from membership in this Association on the ground that he was an enemy of the constitution. Their lordships were unanimous in repelling the objection!

The parade of witnesses began. To the first, Alexander Johnston, Muir objected on the ground that Johnston had previously stated that he would do everything in his power to have Muir hanged. The court observed that a witness might seek to avoid testifying by making such a statement, and might so defeat the ends of justice. Anyhow, said Braxfield, the witness' oath purged him of malice. Let him speak.

Johnston's testimony was a fair sample of the entire case for the prosecution. He swore that he had heard Muir harangue a meeting mostly of young weavers, eighteen to twenty years old, at Kirkintilloch 8 months before. Muir had criticised the representation of the Scots boroughs in Parliament and said that if a man paid twenty thousand pounds for a seat he must get something in exchange. Oddly enough to our ideas, Muir made no effort on cross-examination to show the bias of the witness. Johnston admitted that Muir recommended order and regularity to the meeting, said that tumult or disorder would ruin their cause, and "that there was no other mode of procuring redress but by applying to parliament." . . . "He likewise recommended reading political pamphlets in general."

Another witness, Anne Fisher, former maidservant in the house of Muir's father, seems to have hurt most. Young Mr. Muir, she said, used to be much busied about reading and writing, on what subjects she did not know. She saw a good many country people coming about Mr. Muir's father's shop, and Mr. Muir used to tell them that Paine's *Rights of Man* was a very good book. He would sometimes send Anne out to buy a copy for the countrymen. She once heard Muir advise his barber to buy copies,

"and to keep them in his shop to enlighten the people, as it confuted Mr. Burke entirely, and that a barber's shop was a good place for reading in." Anne borrowed a copy from Muir's manservant to read herself. She had heard Muir say that France was flourishing because free; that the British constitution was good but its abuses needed a thorough reform; "that the court of justiciary would need a thorough reform too, for it was nonsense to see the parade with which the circuit lords came into Glasgow; that they got their money for nothing but pronouncing sentence of death upon poor creatures. . . ." Muir objected at this point (without success) that the indictment did not accuse him of speaking against the courts of law.

As the trial wore on, witness after witness, both for the prosecution and for the defense, testified that Muir had not advocated violence but had urged parliamentary reform. At the close of the testimony the Lord Advocate (prosecuting counsel) addressed the jury. He praised Anne Fisher, and denounced Muir with a wealth of metaphor.

Muir spoke well in his own defense. He stressed the legitimacy of his motives in urging parliamentary reform; but his flight to France after he was apprehended was hard to explain. The excuse he gave,—that he intended to dissuade the revolutionaries from executing the King, seems more ingenious than credible but he urged it stoutly. When the prisoner finished his speech, Lord Braxfield was shocked to hear the crowd applaud.

The charge to the jury by the Lord Justice Clerk was strong stuff:

"I leave it for you to judge, whether it was perfectly innocent or not in Mr. Muir, at such a time, to go about among ignorant country people, and among the lower classes of the people, making them leave off their work, and inducing them to believe that a reform was absolutely necessary to preserve their safety and their liberty, which had it not been for him, they never would have suspected to have been in danger."

The jury came in with a verdict of "Guilty." Muir was sentenced to transportation to New South Wales, for fourteen years. The sentence of the prisoner awakened much sympathy among Foxite Whigs in England and among the anti-Federalists in the United States, and a project was started in America to sent a ship to rescue Muir. Whether by this means or some other, he escaped to South America, and took passage to Spain, which was then at war with England. He was imprisoned as an enemy alien on his arrival in Spain. Talleyrand applied for and obtained his release, and the unfortunate Muir went to Bordeaux, where he died.

Condensed from Indiana
Law Journal, Winter, 1949

Mr. Chief Justice Stone

By HERBERT WECHSLER
Professor of Law, Columbia University

HE TOOK his law clerks from the classroom, as you know, acting with that special faith in youth and in the schools that somehow is maintained upon this Court. We held a perch beneath the rafters of his chambers usually for but a single term. Though jointly we bear witness to the full span of his judicial service, each of us knows nothing but a fragment of the whole, fragments that inevitably differ with all the changes in the issues and the emphases of more than twenty-one exciting years.

If all could be heard, the seniors of our number would speak of the time of the novitiate, when fresh from teaching, practice and the Cabinet he took his seat upon this Bench. These were the terms of first impressions, of initial soundings in the sea of controversy that constitutes the business of the Court. Others would tell of terms when this was over, the bearings taken and directions settled upon many of the major issues of the time. This was the period when the name of Stone was so often joined with those of Holmes and Brandeis or later, of Cardozo, in the great triumvirates that gave warning of the storm approaching before the lightning was seen by others or the thunder generally heard. A third group would dwell upon the years of crisis, the direction of the nation's polity hinging on the trend of the decisions, conflict within the Court no less acute or less portentous than the challenge to the very institution mounting swiftly to a climax in another place upon this hill. Still other voices would describe the time of the judicial readjustment, the unfolding of what the Justice called "the historic shift of emphasis in constitutional interpretation" that began before the Great Debate was through. This was for him the period of the prophetic realization, the dissents of former years delivered now as judgments on so many basic questions, the whole a triumph of persistent conviction that has its parallel in the lives of few judges, its analogue in the stories of few men.

Finally, there are among us some who know the years of service as Chief Justice, judicial labor no less heavy for the addition of administrative duties, the challenge of the great re-

sponsibility sharpened by the awful fact of war. Change in the contentious areas of constitutional controversy was by this time clearly delineated. So too was it made plain that controversy itself had not been ended by the change; that here, as elsewhere, no solutions can be final and definitive—for all give birth to new issues rising from the ashes of the old; that powerful forces and high values, pursuing their persistent competition, ever generate fresh dilemmas to challenge the wisdom of this Court.

Within these changing settings, different themes stand forth throughout the years. The largest point in the beginning had to do, of course, with insular experimentation, the power of a state's democracy to fashion changes in the legal order by laying on the enterprise within its borders restraints or taxes deemed by it—but not by many others—to advance the commonweal. The point, thereafter, has to do with matters far from insular, the power of the men who represent the full constituency to marshal the resources of the nation in ways they think constructive—though many men in every state believe the measures baneful and their purpose even worse. The point in other contexts is concerned with the policing of our federalism, assessing the authority of one state to force its will on men or institutions centered within other borders or engaged in commerce among many states—their standing with the local legislature little more than that of strangers in the gates. Another point, in many ways the most perplexing, centers in the differences that mark controls upon the ways of men in getting and in spending and those that touch affairs of conscience or expression, involving an assault upon the final bulwark of the single human spirit facing other men, his country and his God.

On such great themes as these, the Justice, as occasion offered, brought to bear his full creative power, knowing that to men of law there are no deeper problems, certain of the title and the duty of this Court to fashion from our basic Charter answers that will stand against the cries of faction and the test of time; certain also that no answer stands merely on the ground of its authority, that what maintains a judgment in the end is its appeal to reason for support.

This is, of course, to point to what for us could not but be the highest moments, the days in which the Justice shaped, whether for the Court or in dissent, opinions drawing on the final sanction—the instrument "intended," as he often liked to quote, "to endure for ages to come, and consequently, to be adapted to the various crises in human affairs." His insight was that both the Constitution and this Court are "instruments of

government," that government is an intensely practical activity, its problems centered in the areas of deepest conflict in the interests and affairs of men, its measures born far less of changing theories than of changing facts. He had, therefore, the firm conviction that the basic law must stand above the normal reaches of the conflict and the pressures; that when it speaks to problems of such practical dimension it must direct itself to actuality and cannot rest on vague or flimsy formulae so often scattered in the books.

Men whose fashion is to press their power to the utmost, and they are always many, will never understand how much there was of self-subordination in this great work; the talent and the passion—not to speak of craft—so often given to sustaining measures that the Justice, had their merits been for him, would certainly have held pernicious; the strength of the conviction that, except within the narrow limits where the Constitution speaks most firmly or the highest values stand, the antidote for legislative error must be found not in this Court but at the polls. An age which ever tends to specialize its interests does well to ponder and to honor this capacity for disinterested judging, this ability to etch a standard of adjudication that sustains the governmental structure—whatever party has its transient dominance, whatever

claims to power or advantage win political acceptance for the time.

And even in the reaches where the Justice thought the Constitution posed a bar to legislation —a field in which he did not hesitate to stand alone—the men or doctrines or activities he deemed entitled to protection would not often have achieved a shred of his approval, were the issue what he thought was good or useful rather than the right of other men to do or hold or urge what in their wisdom and in God's broad grace they deemed desirable, however much their fellows disapproved.

Not all men who viewed their duty thus would find the work congenial—despite the honor that attaches to the highest court. In this case, though, I think the mission was completely sympathetic. The reason is, in part, that one who viewed all power as a public trust, its only satisfactions in the chance to render service, was devoted necessarily to abstract and ideal ends. The deeper reason is that Justice Stone was of that small group who really have the democratic spirit—to use a term that

"The jury brought in a verdict of not guilty. I was so happy I shouted for joy. So the judge gave me three months for contempt of court."

has been much abused and never more than at this time. I use it, let me add, in none of those strange senses that distort the minds of men today, nor even in the sense in which democracy is taken to bespeak benevolent compassion. I mean no more and certainly no less than the hard faith that other men, both in and out of office, however much we disapprove their natures or their works, have rights that are entitled to respect; that to define these rights, to cherish and support them is the very heart of the enduring quest for liberty and justice under law.

To speak of self-denial in Justice Stone's conception of judicial duty is not, of course, to mean that he believed the judge's task mechanical or even marginal—and least of all the task of judges of this Court. Needless to say, the "shift in emphasis in constitutional interpretation," to use his words again, involved the most creative adjudication, premised on the view that, as he said, "judicial interpretations of the Constitution, since they were beyond legislative correction, could not be taken as the last word," but were "open to reconsideration, in the light of new experience and greater knowledge and wisdom."

I have a final word that is concerned less with the Justice or the Chief who gave us access to his chambers than with the man who gave us entry to his home. Young lawyers have a tendency to view the law as all-absorbing, forgetting that the richness of a life inheres as much in range of interest and appreciation as in the rule of service and devotion to the daily task. On this point too his law clerks could not but note with awe the Justice's example. For while no other interest could compete with his judicial duty, he managed somehow to dispatch his work without exhausting either time or energy. Somehow within the framework of this busy life he found the moments to devote to living: the house and study Mrs. Stone and he designed with scrupulous attention to detail; music and the arts, including most discriminate collecting; Amherst, the Folger Library and later the Gallery and Smithsonian; evenings of the widest reading; visitors of grand and humble station, received with equal grace; the garden as a place to work as well as linger; long and, if a weaker man may say so, brisk walks each day, with small regard to weather; a joy in talk and growing things and company and knowledge; a taste for wine when it is good; an abiding interest in affairs of scholarship and education; a helpful word to other men who sought advice or lacked encouragement.

Curious Cases of Conditional Bequests and Restrictions in Wills

By JOHN W. GREEN
of the Knoxville Bar

Condensed from Tennessee Law Review, April, 1949

WILLS in which the testator makes a devise or bequest conditional upon the beneficiary doing, or not doing, a certain thing, or the happening or not happening of a certain event, are an every day occurrence, almost as common as wills themselves, and the Courts hold that conditions "however whimsical or capricious" are legal, provided they are possible of performance and do not violate the law. The text books abound in numerous citations of cases where the conditions attached to a testamentary gift are unusual and curious, such as the following:—the beneficiary must change his name; in another case he is required to make his home in a certain locality; in another he must be educated in a Catholic school and adhere to that faith; in another he must abstain from the use of intoxicating liquors.

JOHN W. GREEN

The Courts hold the foregoing conditions and hundreds of other similar ones are valid, and that to be entitled to the gifts, the beneficiaries must comply with the requirements. While it is universally held that the testamentary conditions in total and absolute restraint of marriage are against public policy and void, wills by which the testator leaves property to his wife on condition that she does not remarry, or as it is often otherwise expressed "during her widowhood" are not in restraint of marriage. This exception to the general rule is sometimes predicated on the idea that such a condition protects the testator's widow and children from designing men who would marry the widow for her money. It is also generally held that conditions in partial restraint of marriage, if reasonable, do not violate the rule, such a condition against marrying a Scotchman, or a Jew, or a Roman Catholic, or a Baptist, or provided the beneficiary marries

a person of good social position, or provided the beneficiary does not marry a blood relation—all these provisions have been adjudged to be legal.

The Court characterizes *McKinney vs. Clarke*, 32 Tenn 321, which involved the legality of a bequest made by a husband to his wife on condition that she does not remarry as a "novel case," stating that "the books to which we have had access have been searched in vain for a parallel case." And a brief survey of the facts and circumstances fully confirms this characterization. Cornelius Sullivan, who died in 1846 devised and bequeathed to his wife Mary a plantation and six slaves "during her natural life or widowhood, with remainder to his children." Complainant McKinney recovered several judgments against the widow, and executions were issued and levied on the land and slaves. Before the day appointed for the sale, Mary intermarried with the defendant Clarke. Thereupon McKiney filed a bill to annul the marriage and subject the property to the satisfaction of his judgments. The Chancellor decreed the marriage void so far as it affected complainant's rights and ordered the interest of the defendant Mary to be sold and the proceeds applied on complainant's judgments. Defend-

"Maybe I can't read the last line, but I still saw your client leaving the scene of the crime!"

ants appealed and the Supreme Court reversed the Chancellor for the reason and upon the grounds thus set forth in its opinion:

"The motives and conduct of the said Mary in forming this matrimonial alliance are of a character as exhibited in the record to shock the moral sense of the community and to outrage all the decencies of social life. It is probable from the proof that she has not in fact and perhaps never intended to cohabit with said Clarke who is proven to be a drunken sot, degraded in reputation and loathsome in his habits. There is no doubt that the object of the marriage was to defeat the rights of the complainant. . . . Marriage when consummated according to law, becomes indissoluble except by divorce or death, and cannot be annulled at the instance of a third person for any cause whatever. . . . The interest of the defendant Mary was an estate upon condition, and her subsequent marriage with the other defendant was an absolute forfeiture of that estate as to herself, her creditors and all other persons. This forfeiture she might incur at pleasure and no person known to the law could have restrained her from doing so. The decree will be reversed and the bill will be dismissed."

Another case, *Cannon vs. Apperson*, 82 Tenn 553, involving the will of Wade Bolton and the settlement of the affairs of the firm of Bolton, Dickens & Company is interesting not only because of the unusual conditions attached to certain bequests made in the will but also because the bitterness and animosities engendered by the litigation, culminating in violence and tragedy seldom if ever equalled in a civil court proceeding. Bolton, Dickens & Company prior to the Civil War were extensively engaged in the business of buying and selling negroes. The partnership expired by limitation and the partners failing to agree on a settlement, fell out among themselves and resorted to the Chancery Court in Memphis by bills and crossbills for the adjustment of their differences. Many thousands of dollars were involved and the contending parties were represented by some of the most distinguished lawyers in the State. The chief protagonists were Wade Bolton and Tom Dickens. Bolton carried his animosity toward Dickens beyond the grave and perpetuated it in a will drawn by himself. In seven separate paragraphs of the will he repeated in substantially the same language the conditions upon which he made seven separate bequests as follows:

"that the legatees do all that they can to defeat the gigantic swindle old Tom Dickens, the land pirate, has instituted against me in the Chancery Court at Memphis and the onus shall be upon them to show my

executors they (the legatees) have done all they can to defeat the same." The seventh paragraph is as follows: "I give and bequeath my niece Josephine Bolton, now the wife of the notorious Doctor Samuel Dickens (the Judas of the family), five dollars, one-sixth of what Judas Iscariot got for the betraying of the Lord. . . . Any of the legatees aiding or abetting in anywise, shape or manner directly or indirectly with old Tom Dickens and Sarah W. Bolton in this gigantic fraudulent suit against me forfeits all their right to the legacies bequeathed to them in this will."

Payment of the legacies was resisted on the ground that the conditions imposed by the will were against public policy and void, but the Court overruled the contention. Neither Bolton nor Dickens lived to see the result of the litigation. Both were killed during its progress, and before its final termination; several of their friends and partizans suffered the same fate.

It may be interesting in conclusion to note that Bolton failed to make out his case of "gigantic swindle" against Dickens, the Court holding that the several partners by their actions and conduct had estopped themselves from obtaining relief against each other.

One of the most noted and spectacular cases ever tried in the Supreme Court of the United States involved the legality of a strange restriction in the will of Stephen Girard, *Vidal vs. Girard's Executors*, 2 How 127 (11th Law Edition 204). The testator, a native of France, came to this country prior to the Revolutionary War, settled in Philadelphia, and amassed a fortune in his various enterprises as a shipmaster, merchant and banker. He died in 1831 unmarried and without issue, leaving a will by which he bequeathed to the city of Philadelphia in trust an estate valued at six million dollars for the purpose of establishing a college to train and educate "poor white male orphans between the ages of six and ten years giving preference, first to orphans born in the City of Philadelphia; secondly to those born in any other part of Pennsylvania; thirdly, to those born in the City of New York; and lastly to those born in the City of New Orleans." The following restrictions were coupled with the bequest: "No ecclesiastical missionary or minister of any sect whatsoever shall hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose or as a visitor within the premises of the said college."

The will then goes on to explain that the foregoing restrictions were not meant to cast any reflection upon any sect or person; and all instructors and teachers are enjoined to "instill in the minds of the schol-

ars the purest principles of morality, and a love of truth, sobriety and industry and such religious tenents as their matured reason may enable them to prefer."

The heirs of Girard filed a bill in the United States Circuit Court in 1841 attacking the will on two grounds, viz: 1st, that the proposed system of education was un-Christian; 2nd, that the beneficiaries were too uncertain. The case attracted wide attention, and when it came on for argument before the Supreme Court the room was filled to capacity with spectators, among whom were members of the Richmond, New York and Philadelphia bars. Mr. Benney, chief counsel for the trustee, who had made a special trip to England to study the law of charitable uses, spoke for three days. Daniel Webster, chief counsel for the heirs, spoke three days, and the arguments of other counsel occupied five more days of the time of the Court. At the January term 1844 Mr. Justice Story in an elaborate unanimous opinion, adverse to the heirs on all points, affirmed the decree of the Circuit Court and dismissed the bill.

If Girard could come back to the earth and visit Philadelphia on this the one hundredth anniversary of the opening of Girard College he would see that it is located on forty-three acres surrounded by a stone wall ten feet high, in the heart of one of the greatest cities in America; that there are twenty-nine handsome buildings within the enclosure; that the six million dollars he invested in the benefaction has now increased to ninety millions in value. He would learn that the Bible is read every morning at the chapel exercises; that grace is said at every meal and prayers are offered every night; that thousands of the "poor white boys" from every state in the Union who have been trained and educated in the college have made good in all trades, and in every kind of business and profession, including the ministry.

A Layman Views The Courts

by W. A. BAILEY

Editor and Manager, The Kansas City Kansan, Kansas City, Kansas

Condensed from Federal Probation, June, 1948

MY INTEREST in "viewing the courts" dates back to my first year following graduation from Baker University in 1905. In the fall of that year I entered the teaching profession as principal of the Eureka, Kansas, High School. I was fortunate enough to secure a room at the home of Pinaldo P. Kelley, a leading attorney of that city. He had been successful in the practice of law, had a good home, comfortably situated, had traveled some, and had continued the studious habits he had formed in Ames University, Iowa, where he had received his law degree. Mr. Kelley and I spent many hours during the two years I lived in his home discussing law, lawyers, and the courts.

Ever since those days I wanted to check up on some of the things he told me. I have been curious to know whether there were other lawyers who felt as he did and if so whether they had published their views, also to learn if anything had been done to change these conditions we discussed some more than 40 years ago.

At the outset, I want to make it clear that I do not present this paper as a critique of the law. Such presentation of incidents, seen and experienced, or which have come to my attention, is made in response to an assignment and with the hope that they may prove helpful to the cause in which we commonly are concerned—the securing of a wider and more equitable dispensation of justice.

The major premise of this paper is that laymen everywhere have a deep-seated feeling that there is too much miscarriage of justice throughout the length and breadth of the land and that this feeling has been building up over a period of years. It is difficult for a layman who has not tried to analyze this feeling to explain why he feels so, like Topsy—it has just grown up. It is the cumulative resultant formed from the information he has acquired from reading of trials, court rulings, questionable practices indulged in by certain types of lawyers, and from the dramatization of crimes he has seen and heard.

Let us take a look at some of the dilatory tactics utilized by some attorneys.

When certain members of the bar are announced in connection

with a case we know their first move will be to ask for a continuance. They usually begin their cases by pleading illness or absence of a litigant or a witness. Their main object is delay—possibly only because it was just "inconvenient" for them or their clients at that particular time. And, parenthetically, I may say, the thing which disturbs us most, is that the judges know the tactics of these lawyers. Why they tolerate them further dismays us.

One of the best continuance stories of our personal experience is that of a local court case which I give you as related by our court reporter.

Unusual but true is the history of a Wyandotte County District Court case in which a rather attractive woman was charged with violation of the prohibitory law. Her attorney obtained several continuances for this and that reason and when it seemed he had about run out of reasons he came up with the statement that his client was going to become a mother. This reason called for additional continuances from time to time. The attorney finally stated that his client was about to enter the hospital. The next time the case was called he said his client was unable to appear owing to the fact she had become a mother, not of one baby but of twins, but notwithstanding he would

"I've heard him in court before, your honor!"

have her in court soon. And sure enough, next time the case was called, in came the lawyer accompanied by the woman with her babies in her arms, well dressed and adorable. The babies were handed to the young women in the district clerk's office, and the mother defendant, followed by the court attache with babes in arms, marched in triumphal procession through several law-enforcement offices adjoining the "Hall of Courts" at the court house.

As you have already anticipated, the defense attorney asked for release of his client on the claim that she had sold the liquor solely to help obtain money to pay expenses for the baby she had been expecting. And, he added, "the baby turned out to be twins, judge!"

Well, what would you have done? The court concurred with the defense attorney and the county attorney that there was nothing to do but release the mother to go home and care for her twins with the admonition that she not sell liquor again.

A minor offense you may say—yes—but it illustrates the miscarriage of justice brought about through use of the "continuance method."

When this case was recalled recently to the judge in whose court it was tried, he stated that he was keenly aware of the misuse of continuances and he insisted that he is now doing what he can to curtail it.

The elements which make for these delays are so involved that a layman can scarcely comprehend them, let alone make any suggestions to relieve them. Judges, lawyers, statutes, constitutions, legislators, vast numbers of litigants, the selection of juries, appeals—all these are but a few of the many elements which contribute to produce lag in litigation.

However, the situation is not as hopeless as it may seem. We know that the American Bar Association for years has been striving to correct this acknowledged weakness in the law. Militant lawyers have dared to speak against it. Legislatures and Congress are aiding through the medium of new and amended laws which are being piloted through the sessions by able lawyers who want to see the high ethical standards of the bar made the motivating force in the dispensing of justice.

With respect to trial by juries, we find our juries in too many cases are made up mostly of those jurors who have not laid down on the judge to excuse them. The residue is too often "run of the mine." We plead guilty to the charge of having ourself asked to be relieved of jury service and of having asked to have certain of our employees excused. Our defense is that this was during war days when we were trying to operate with greatly curtailed staffs.

There should be a tightening

up on the part of judges to excuse from jury service as well as an easing up on the part of individuals requesting to be excused. I wonder, however, if we should go as far as the Honorable Orel Bushby, Justice of the Supreme Court of Oklahoma, who said if he had the power the only excuse he would accept for "non jury service would be that for which a soldier in uniform is excused from fighting for his country—that is, illness or physical incapacity."

In these days of keen competition, high costs, shortened hours, and a super amount of detail the small businessman cannot be away from his business for any great length of time without working a distinct hardship on him and his business. Federal Judge Arthur Mellott of this District has made a good suggestion to the committee handling plans for our new post office and federal building with respect to laying out the quarters for the federal district court. He advocates a room furnished with telephone, desks, and stenographic equipment so that a businessman called to jury service may keep in touch with his office and if necessary have his secretary come to the room for dictation. I might add that this judge follows the practice of allowing jurors as much freedom as possible and seeks to conserve their time by excusing them from hanging around, whenever possible.

Jury fees are insufficient. They should be increased sufficiently to meet living expenses at least. Frequently those called for jury service cannot financially afford to serve and when they are forced to serve they do so at a financial sacrifice. Unions are trying to make jury service a part of their contracts to the extent that when members are called for jury service their pay shall be continued by their employers on the regular scale basis. There is certainly some merit to this request. In the interests of good jury service the government well may consider assuming this cost.

There should be more of an inclination on the part of attorneys to take a chance on the fair-mindedness of reputable businessmen. A prominent banker in our community for years has answered regularly his summons for jury service. He almost always is allowed to sit out his summons. The attorneys know him and trust his knowledge and ability in most anything but jury service. It is discouraging to those interested in the dispensing of justice to see the substitutes.

"Professional jurymen" would not be favored to the total exclusion of even our "run of the mine" jurymen in our community. As one of our judges observed on a recent occasion, "our system is not perfect but it does provide a jury which is a cross section of the life of our commu-

nity and they are less likely to become too involved in technicalities of the law; they have a fresher and more unbiased attitude and despite occasional errors will come close to arriving at just decisions most of the time."

In my opinion we never must completely abandon the jury system. On the other hand there is no doubt in my mind but what judges should be handling many of the cases which are now being committed to juries. In the words of the Irishman "there is a beautiful extreme right in the middle."

Lack of dignity in the courts tends toward lack of respect for the courts and the law.

During the recent session of the Kansas Bar Association, held last month, the judges' conference discussed this topic. The discussion developed the fact that many judges in our state had no formal opening of their courts and it was concluded that our courts in some instances have fallen into a rather slipshod method of procedure, resulting in an increasing lack of respect both for the court and the law itself.

By experience we have learned that one way to command respect is to make physical improvement of court quarters. This was noticed when our district judges moved into their quarters in our new courthouse.

"I'm in for bigamy. I read that book on how to make friends. In my case they happened to be women!"

THE 1950 ALEXANDER FEDERAL TAX HANDBOOK

Ready now!

The 1950 issue of the eminent Alexander Federal Tax Handbook, now published by the CO-OPS, is just off the press.

This standard Federal Tax Handbook covers income taxes, gift taxes, estate taxes, social security taxes, manufacturers' and miscellaneous taxes. Its concise and logical treatment of the subject makes this Handbook of great help and value in handling the tax problems confronting you.

Send now for your copy of the finest Alexander Federal Tax Handbook ever published and examine it on 10 days' approval. With it get your copy of our FREE BOOKLET on Tax Savings, Forms and Procedure.

Clip, sign and mail today.

The Lawyers Co-operative Publishing Co.
Rochester 3, New York

Please send me on 10 days' approval a copy of the 1950 Alexander Federal Tax Handbook at $15.00 and the FREE BOOKLET on Tax Savings, Forms and Procedure.

*Name*_____

*Address*_____

*City*_____ *Zone*_____ *State*_____

The type of furnishings; harmony of color schemes; accoustical treatment; separation of quarters for jury, lawyers, press and the public—this environment tends to impress those who enter that truly here is a hall of justice and the corresponding result is the prevalence of a feeling of solemnity and respect.

Too frequently in justice of the peace courts dignity descends to its lowest point, in fact to the vanishing point. This is due usually to the lack of legally qualified judges and most frequently to places where courts are held. Kitchens, barns, general stores, filling stations, corn fields, ice cream parlors, restaurants or any other place which may serve as a refuge from weather or pests are used as "halls of justice." Certainly such conditions breed contempt for the law. Justice, fair and impartial, does not germinate easily in such environments.

One of the best investments society could make for the bettering of these lower courts would be to provide adequate physical quarters in which to administer justice. They would tend toward the generation of a feeling that he who would practice here must be worthy, and he who comes seeking justice will find it. Truth, that which courts are created to find, is associated with cleanliness, purity, harmony, and beauty.

It is not necessary for me to do other than briefly refer to the shyster lawyer and ambulance chaser. They fill the place in your profession the yellow journalists occupy in ours. They exist in spite of all you thus far have been able to do. They are individuals to whom remuneration supersedes ethical commitments. However, their achievements in a material way give them certain powers in the community in which they operate. They are hold-up men who operate within the law. They maintain a certain degree of social rank and respectability. Their practices do more to discredit the profession of law than any other single factor. "Shyster lawyers" and "ambulance chasers" have become by-words to laymen. In the interests of good administration of justice their right to operate should be curtailed. Maybe fuller publicity of their doings should be given to the end that an aroused public would aid your profession in curbing them.

This exposition would not be complete without reference to the relation judges bear to our theme. No one will gainsay that the judge is the central figure in the setup for the administration of justice. By and large, on a percentage basis, judges of this country have measured up well to the high standard of performance required of them. Here and there we find a case where one has faltered or fallen and as the church in general is criticized for the

backslider, so the judicial family is censored for the wayward judge.

There are certain qualifications which a judge should possess, foremost of which is a knowledge of the law. To this fundamental requisite there must be added character, poise, a good disposition, and studious habits.

The selection of this type of individual requires a shifting process. In theory at least, this is easy when a lawyer becomes a judge by appointment to office, especially when the appointment must be confirmed. But the great majority of judges are selected by political parties. In such cases the selection takes into consideration other qualities, chief of which is the ability to win votes. Here is the rub. Too frequently essential qualities receive secondary consideration.

A judge serving as an elected official works under limitations with which an appointed official does not have to contend. Parties who have been responsible in the election of a judge too frequently expect some "small considerations." While they may expect the judge to be honest in the performance of his judicial functions, they request him to do "little things" such as excuse their friends from jury service; kill summons in traffic violation; release prisoners on bail; fix bail as occasions demand, either high or low; grant stays and continuances; keep in touch with political headquarters; contribute to the party's fund; and they even make suggestions as to the personnel he should employ in his office. Judges under such pressure cannot possibly administer justice fairly and impartially.

A judge—the keystone in the framework of justice—must be of the kind and quality of citizen whom all respect and he must be given that freedom of operation which will be conducive to the full and free administration of justice. To this end lawyers and laymen must continue to plan and work.

I prefer to conclude this discussion by showing the importance of giving consideration to dissonant voices. To this end let us review certain trends within this country. We shall classify them as progressive movements most of which began germinating with the advent of the 20th Century. In the field of education it was the defender of the classics arrayed against the psychologists and scientists, the latter contending that schools exist for the development of the masses—and to that end advocated changes in teaching methods and in curriculum content. In religion, the contest was between the fundamentalists and the moderns. The former would stick strictly to the word of the Bible and the latter would broaden the interpretation of the word and socialize the work of the church. In medicine one group

would stick to old methods and techniques and the other would include those sciences which contribute to man's state of mind and some would go so far as to socialize medicine. In politics we had the standpatters, the progressives and the Bull Moosers. In the ranks of the lawyers we had those who looked on the law as principles to aid in the administration of justice which had been established once and for all, opposed by those who believed that laws are made "of the people, by the people, and for the people" and hence must be applied in conformity with social, economic, and political changes.

Approximately 15 years ago all these progressive movements were skillfully maneuvered into a sort of coalition movement by keen, skillful, political leaders under the catch phrase of a "new deal." The move was perfectly timed. It came upon the country when the "old guards" were really and rightfully on the ropes. It swept the masses as a prairie fire. Criticisms of all former practices became the order of the day. It stormed the bulwarks of the law and became a field day for critics of the bar—lawyers and judges were no exception.

It is not within the scope of this paper to touch on the re-

"This will be my fifth divorce—I guess I'm just not the marrying kind!"

forms—social, political, and economic—which came with this era. Suffice it to say that reforms long overdue were brought about and as is too frequently the case, the pendulum swung too far in the opposite direction. Our concern is to trace the effects of this reformation period on the practice of law.

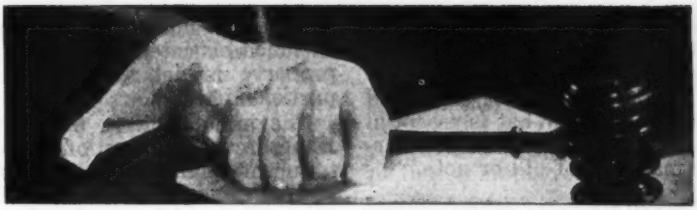
It was in the early part of this period which has come to be known as the period of the "new deal" that former President Franklin D. Roosevelt dared to characterize the Supreme Court as "nine old men." While we never have agreed with the method he advocated for changing the personnel of the Supreme Court and while we feel that he dimmed for years to come the faith of the common man in the majesty of this court, nevertheless, we must concede that he brought clearly to public light, in an extraordinarily dramatic manner, the idea that laws must be studied with respect to their application to the social, political, and economic conditions of the period to which they apply.

Every lawyer in the land has seen administrative bureaucracy at work in his community. He has witnessed law by consent to a degree that has astonished him. He has learned of certain industrial groups who, weary of the technicalities and delays of the law, have adopted policies of nonlitigation. He is disturbed by these movements because he knows they tend in the wrong direction. For he, probably better than anyone else, knows that whenever any group takes unto itself the regulation of its acts for its own self-interest that movement is away from democracy and toward totalitarianism.

Yet, this is what actually is going on in the United States today—quite a bit slower than during the war years but nevertheless it still is a moving force. Rule by groups and blocks operating under the protection of hastily drafted laws must be checked.

Lawyers are to blame to a certain extent for this state of affairs. Too many lawyers throughout the years have lost sight of the fact that under our system of government "we license lawyers, not for the purpose of setting up a privileged class but for the protection of the general public." The lawyer himself is the controlling factor in this labyrinth of law. He alone can change trends against him. The primary requisite is that he must have a full comprehension of the fact that law is made for the betterment of society as a whole—not a particular group of individuals.

So long as it appears to laymen that lawyers place the interests of their clients above those of the public, just so long will they cease to have faith in a government purported to be based on law and order.



Among the New Decisions

Automobile Insurance — *what amounts to permission of owner under omnibus clause.* An automobile insurance question was decided in State Farm Mutual Automobile Insurance Co. v. Cook, 186 Va 658, 43 SE2d 863, 5 ALR2d 594, opinion by Justice Browning. It was held that implied permission to use an automobile, within an omnibus clause of a liability policy, involves an inference arising from a course of conduct or a relationship in which there is mutual acquiescence or lack of objection under circumstances signifying assent, and is not confined to affirmative action.

The annotation in 5 ALR2d 600 discusses "Automobile liability insurance: permission or consent to employee's use of car within meaning of omnibus coverage clause."

Automobiles — *overcoming presumption of ownership.* The Michigan Supreme Court, opinion by Justice Boyles, held in Cebulak v. Lewis, 320 Mich 710, 32 NW2d 21, 5 ALR2d 186, that in an action for injuries inflicted by an automobile driven by the owner's daughter, the credibility of testimony of the father and daughter that the latter had been instructed not to drive the automobile in the former's absence, although uncontradicted, is for the jury, where both were evasive under cross-examination and their testimony was to some extent uncertain on material issues.

The annotation in 5 ALR2d 196 discusses "Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile."

Bills and Notes — *exercise of option to accelerate maturity.* The Texas Court in Faulk v. Futch, — Tex —, 214 SW2d 614, 5 ALR2d 963, opinion by Justice Sharp, held that where acceleration of maturity of a promissory note upon default in the payment of any instalment is optional with the holder, the option

may not be exercised until the note has been presented for payment.

The annotation in 5 ALR2d 968 discusses "What is essential to exercise of option to accelerate maturity of bill or note."

Certiorari — *jurisdictional facts.* The Arizona Court in Hunt v. Norton, 68 Ariz 1, 198 P2d 124, 5 ALR2d 668, opinion by Justice Udall, held that the purpose of the writ of certiorari is to review the findings and acts of inferior tribunals and officers exercising judicial or quasi-judicial functions, to determine whether their jurisdiction has been exceeded.

The subject of the annotation in 5 ALR2d 675 is "Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari."

Cotenancy — *accounting for minerals and timber removed.* The Texas Court in White v. Smyth, — Tex —, 214 SW2d 967, 5 ALR2d 1348, opinion by Justice Smedley, held that a cotenant who mines, processes, and markets rock asphalt from the land is liable to account to his cotenant on the basis of the net profits, computed by deducting from gross proceeds the expenses incurred by the producer and reasonable compensation for his personal services and for the use of his property, and not merely for the value of the mineral in the ground, although he has mined no more than his share of the mineral and has not excluded his cotenant, where the property is not susceptible of partition in kind.

The annotation in 5 ALR2d 1368 discusses "Basis of computation of cotenant's accountability for minerals and timber removed from the property."

Criminal Law — *bill of particulars.* An important question of criminal law was presented in State v. Petro, 148 Ohio St 473, 76 NE2d 355, 5 ALR2d 425. The opinion prepared by Justice Turner held that failure to furnish one charged merely with purposely, and of deliberate and premeditated malice, killing a person named, at a county named, on or about a specified date, with a bill of particulars is prejudicial error where the indictment does not specify the manner or means or the particular place, and the coroner's verdict shows the victim's death to have occurred on a subsequent date.

An extensive annotation in 5 ALR2d 444 discusses the question "Right of accused to bill of particulars.

Eminent Domain — *surrender of rights.* The ALR editor's summary of the case of De Penning v. Iowa Power and Light Co. — Iowa —, 33 NW2d 503, 5 ALR2d 716, opinion by Garfield, J., is as follows: On appeal from a commissioners' award of damages for the condemnation of a right of way for

an electrical transmission line, the condemner, with a view to reducing the amount awarded, disclaimed any right of access over the grantor's remaining lands to the strip in question. The condemner might, in initiating the proceeding, have so limited the original taking as to exclude such right of access, and the question was whether it could so at a later stage. It was held that this could be done; and that any prejudice to the landowner therefrom could be compensated by apportioning the costs of appeal.

The annotation in 5 ALR2d 724 discusses "Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation."

Executors and Administrators — *duty to complete improvements.* In Re Rushbrook's Will Trusts (1948) 1 Ch (Eng) 421, 5 ALR2d 1248, opinion by Justice Vaisey, it was held that where, after the execution of a will devising a farm, a house thereon was damaged by fire and the testator, having received an insurance payment on the loss, contracted with a builder to make repairs, and the builder delivered bricks on the premises prior to the testator's death, and the executors, with the acquiescence of the builder, disclaimed responsibility for the repairs, the devisees may require the executors to expend out of the estate a sum not exceeding the contract price for the making of the repairs.

The annotation in 5 ALR2d 1250 discusses "Right of devisee or heir and duty of personal representative with respect to completion of improvements."

Federal Procedure — *transfer to proper district.* Circuit Judge Maris of the Third Circuit prepared the opinion in Schoen v. Mountain Producers Corp. 170 F2d 707, 5 ALR2d 1226, holding that the discretion conferred by statute providing that a Federal district court may, for the convenience of parties and witnesses, in the interest of justice, transfer any civil action to any other district or division where it might have been brought, may not be controlled by a circuit court of appeals.

This question "Constitutionality, construction, and application of Federal statutes providing that district courts may transfer any civil action to any other district or division where it might have been brought" is discussed in the annotation in 5 ALR2d 1239.

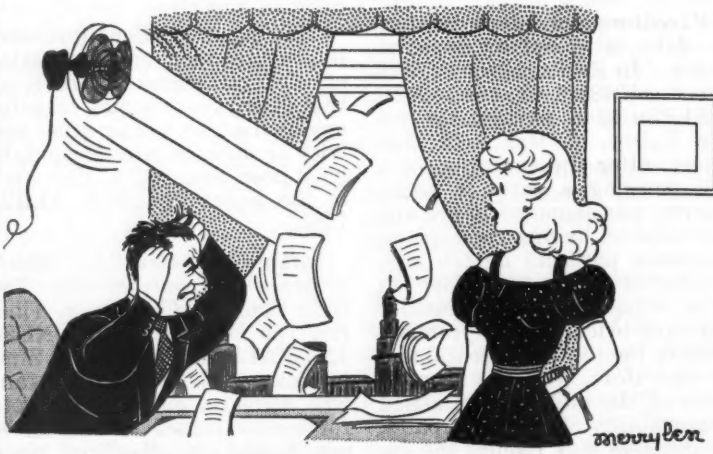
Infants — *time for disaffirmance of contract of.* The Ohio Court in Cassella v. Tiberio, 150 Ohio St 27, 80 NE2d 426, 5 ALR2d 1, opinion by Zimmerman, J., held that an infant who signs as guarantor a note for money loaned to another is not bound to disaffirm upon reaching majority, to escape liability thereunder.

An extensive annotation in 5 ALR2d 7 discusses "Failure to disaffirm as ratification of infant's executory contract."

Libel and Slander — *by radio broadcaster.* The summary of the decision in Kelly v. Hoffman, — NJ —, 61 A2d 143, 5 ALR2d 951, opinion by Justice Burling, is a radio broadcasting station sold time to one whose employee in the course of a news broadcast made statements reflecting on the official integrity of a Deputy Commissioner of Public Safety. In determining whether this created a cause of action against the operator of the broadcasting station, it was held that such operator was not liable unless it could have prevented the publication by the exercise of reasonable care.

The annotation in 5 ALR2d 957 discusses "Liability of radio broadcasting company for defamatory statement by one not in its employ during broadcast."

Limitation of Actions — *overflowing of lands.* The Texas Court in Baker v. Fort Worth, 146 Tex 600, 210 SW2d 564, 5 ALR2d 297, opinion by Justice Folley, held that the statute of limitations begins to run against a cause of action for flood damages in consequence of a city's construction of a bridge across a stream, from the time of the flooding where, at the time the



"Well don't get excited—they're only legal documents!"

The *Electronic Memory*

Records Court Performances Verbatim!

You'll find the Webster-Chicago Model 180 Portable Wire Recorder easily adaptable to client interviews, conferences, discussions of cases, and other important points. Back in the quiet of your office, the playback of the court-room testimony will reveal voice inflections, obscure facts and details which may be of vital importance in winning your case.

Complete with microphone and 3 spools of wire, the *Electronic Memory* is ready to plug into an AC outlet for recording or listening. The *pre-tested* recording wire may be erased and re-used thousands of times or kept indefinitely without loss of fidelity.

See your nearest dealer for a demonstration or write for the interesting free booklet.

WEBSTER·CHICAGO

CORPORATION

5610 W. Bloomingdale Avenue, Chicago, Ill.

Makers of Wire Recorders, Record Changers, Phonographs, Nylon Needles

Webster-Chicago, Dept. L2-92, 5610 W. Bloomingdale Ave., Chicago 39, Illinois

Gentlemen: Please send me a copy of "The *Electronic Memory* for Commercial and Professional Use."

Name..... City.....

Address..... Zone.....State.....

bridge was constructed, it was not certain the plaintiff would suffer damages in consequence, and subsequent overflows caused only negligible damage.

The title of the annotation in 5 ALR2d 302 is "When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction."

Limitation of Actions — *tax deeds.* The California Court in Tannhauser v. Adams, 31 Cal2d 169, 187 P2d 716, 5 ALR2d 1015, opinion by Justice Schauer, held that irrespective of whether a failure to mail a notice of a tax sale to the person last assessed is a jurisdictional defect, he may not attack the title of a purchaser who has been in possession for the period to which a statute limits the questioning of a tax title by the former owner, provided such period is a reasonable one.

The title of the annotation in 5 ALR2d 1021 is "Statutory limitation of period for attack on tax deed as affected by failure to comply with statutory requirement as to notice before tax deed."

Municipal Corporations — *flood prevention.* In Krantz v. Hutchinson, 165 Kan 449, 196 P2d 227, 5 ALR2d 47, opinion by Justice Hoch, the Board of Commissioners of a city, for the purpose of protecting its streets and property and the property of its inhabitants from a threatened flood, constructed a dike at a greater distance from the city than they were authorized by statute to go for the purpose. The effect was to prevent floodwaters from flowing in their usual floodwater course and to cause them to flow over and across plaintiff's land, with consequent damage thereto.

In an action brought against it for such damage, the city unsuccessfully contended that the act was in the exercise of a governmental rather than a proprietary function, with consequent nonliability, and that in any event it was not liable because the act of its officers was ultra vires.

The annotation in 5 ALR2d 57 discusses the broader question "Liability of municipality or other governmental subdivision in connection with flood protection measures."

Negligence — *injury by one of several.* An interesting question was presented in Summers v. Tice, 33 Cal2d (Adv 48), 199 P2d 1, 5 ALR2d 91, opinion by Justice Carter. The facts of the case were: Plaintiff, while hunting with two companions, received a pellet of bird shot in an eye and another in his upper lip when both his companions, in firing at a quail, shot in his direction. While it was the understanding that they should keep in line, plaintiff, in the center, proceeded up a hill, thus placing the hunters at points of a triangle. Plaintiff was in sight of

and about 75 yards distant from his companions, who knew his location.

It was held that a finding of negligence on the part of the others and of the absence of contributory negligence on the part of the plaintiff was warranted by the evidence; and that if it could not be ascertained whose shots caused the damage, they were jointly liable although the major injury was by a single pellet only.

The annotation in 5 ALR2d 98 discusses "Liability of several persons guilty of acts one of which alone caused injury, in absence of showing as to whose act was the cause."

Negligence — *street worker.* The Maryland Court in Baltimore Transit Co. v. Worth, — Md —, 52 A2d 249, 5 ALR2d 740, opinion by Justice Collins, holds that whether injury to a workman in an open manhole, into which the projecting roof step of a passing streetcar knocked a railing guarding the manhole, was attributable to the act of one whose duty it was to look out for the safety of the man in the manhole and move the railing to give sufficient clearance for passing streetcars, in waving to the motorman to proceed, is for the jury, where he had no reason to believe that the projecting roof step, which normally was closed, was open.

The extensive annotation in 5 ALR2d 757 discusses "Liability for injury by vehicle to construction or maintenance worker in street or highway."

Nuisances — *casting light on another's property.* In Amphitheaters, Inc. v. Portland Meadows, — Or —, 198 P2d 847, 5 ALR2d 690, opinion by Brand, J., it was held that the casting of light, equivalent to that of a full moon, by the lighting equipment of a race track upon the screen of a drive-in open-air motion-picture theater operated by a lessee of the land, constructed at the same time as the race track and located over 800 feet from the track, held, as a matter of law, not to constitute a nuisance for which the operator of the theater may recover damages, although it adversely affects the showing of motion pictures.

The annotation in 5 ALR2d 705 discusses "Casting of light on another's premises as constituting actionable wrong."

Oil and Gas Lease — *relief from forfeiture.* The Kansas Court in Browning v. Weaver, 158 Kan 255, 146 P2d 390, 5 ALR2d 985, opinion by Justice Smith, held that an "unless" oil and gas lease will not be declared to have expired because of noncompliance with the requirement that delay rentals be deposited in a designated bank, where the lessee's assignee mistakenly deposited the money in another bank, which mailed a duplicate deposit slip to the les-

sor, who allowed the money to remain on deposit and made no demand for cancelation of the lease until after the assignee, at a considerable expenditure, had drilled an oil-producing well on adjacent land which he also had under lease.

The annotation in 5 ALR2d 993 discusses "Mistake, accident, inadvertence, etc., as ground for relief from termination or forfeiture of oil or gas lease for failure to complete well, commence drilling, or pay rental, strictly on time."

Public Officers — *expenses as part of salary.* In Manning v. Sims, 308 Ky 587, 213 SW2d 577, 5 ALR2d 1154, opinion by Special Chief Justice Leary, it was held that the allowance of reasonable expenses incurred in the discharge of the duties of a public officer is neither salary, compensation, nor an emolument of office within a constitutional prohibition of a change in the salary of public officers during their term, or a provision limiting the amount of compensation which a public officer shall receive for his services, even though the effect of the allowance is to relieve the recipient of the necessity of paying such expenses out of his salary.

The annotation in 5 ALR2d 1182 discusses "Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements."

Public Officers — *liability for interest on funds.* In Bordy v. Smith, 150 Neb 272, 34 NW2d 331, 5 ALR2d 250, opinion by Justice Wenke, it was held that interest resulting from an investment by the clerk of the district court of the proceeds of tax foreclosure bids received by him in virtue of his office may not be claimed by the county clerk under a statute which provides that the clerk shall in no case retain for his own use "money fees, revenues, perquisites, or receipts" fixed or provided by statute, but shall pay them to the county treasurer, who shall credit them to the general fund of the county.

An extensive annotation under the title "Liability of public officer for interest or other earnings received on public money in his possession" appears in 5 ALR2d 257.

Public Officers — *statute making officers employees.* The California Court in Knight v. Board of Administration, 32 Cal2d 400, 196 P2d 547, 5 ALR2d 410, opinion by Justice Carter, held that a retirement pension system for members of the state legislature is within a constitutional grant of power to provide for the payment of retirement salaries "to employees of the state," notwithstanding other constitutional provisions prescribe and limit the compensation of members of the legislature.

The annotation in 5 ALR2d 415 discusses the question "Con-

stitutional or statutory provision referring to 'employees' as including public officers."

Railroad Crossings — *extent of signal from train approaching.* In Knorp v. Thompson, 357 Mo 1062, 212 SW2d 584, 2 ALR 2d 103, opinion by Douglas, P. J., it was held that due care does not require a locomotive engineer who on approaching a crossing gave the usual whistle signal of two long, a short, and a long, continuing until the crossing was reached, to sound instead short blasts of the whistle upon perceiving that a vehicle was about to enter the crossing.

The title of the annotation in 5 ALR2d 112 is "Customary or statutory signal from train as measure of railroad's duty as to warning at highway crossing."

Search and Seizure — *truth of affidavit in search warrant affidavit.* The Maryland Court in Smith v. State, — Md —, 62 A2d 287, 5 ALR2d 386, opinion by Justice Collins, held that on motion to quash a search warrant and for return of property seized, the truth of the matters alleged in the supporting affidavit is not open to consideration unless a statute otherwise provides.

The title of the annotation in 5 ALR2d 394 is "Search warrants: Disputing matters stated in supporting affidavit."

Second Offenders — *what constitutes former "conviction."* The Michigan Court in People v. Funk, 321 Mich 617, 33 NW2d 95, 5 ALR2d 1077, opinion by Justice Dethmers, held that the fact that sentence was not imposed on a prior conviction does not prevent the consideration of such conviction to enhance the punishment of the defendant under the Habitual Criminal Act.

An extensive annotation in 5 ALR2d 1080 discusses "What constitutes former 'conviction' within statute enhancing penalty for second or subsequent offense."

Specific Performance — *effect of condition as to obtaining loan.* A question which arises very frequently was decided in Nyder v. Champlin, 401 Ill 317, 81 NE2d 923, 5 ALR2d 282, opinion by Justice Simpson, where it was held that a land contract conditioned on the purchaser's ability to obtain a mortgage loan for a specified amount may not be avoided by the seller because the purchaser was not able to secure a mortgage for such amount, where he has obtained the necessary funds from other sources.

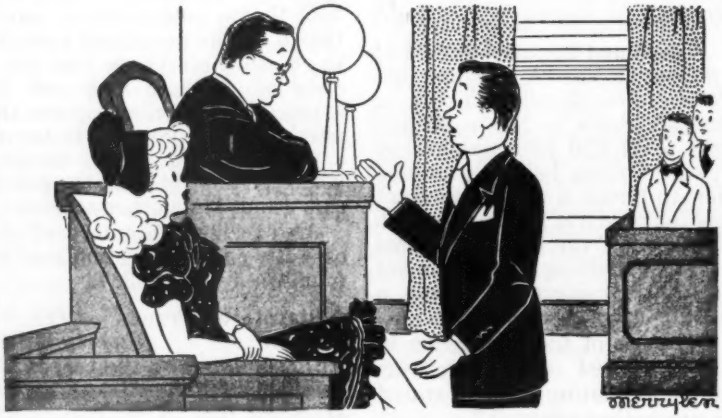
An excellent summary of the case law on this question may be found in 5 ALR2d 287.

Statute of Frauds — *restrictions on use of property.* The ALR summary of the case, Cottrell v. Nurnberger, — W Va —, 47 SE2d 454, 5 ALR2d 1298, opinion by Justice Haymond, is as follows: Purchasers of lots in a subdivision sought to prevent the building of a hotel on a

certain part of the tract on the ground that the owner of the property had orally represented to them when they purchased their lots that such part was to be used for playground, recreational, and other community purposes. It was held that the right asserted was not a mere license but an easement, and therefore could be created only by written instrument; that the property owner's nonperformance of his promise was not such fraud as to remove it from the statute of frauds; and that the purchasers' payment of a larger price by reason of the representation, their improvement of their own lots, and their use of the land in question for the contemplated purposes, was not such part performance as to take the seller's promise out of the statute.

The annotation in 5 ALR2d 1316 discusses "Oral agreement restricting use of real property as within statute of frauds."

Statutes — *reference to act repealed or amended.* The Tennessee Supreme Court in Brown v. Knox County, — Tenn —, 212 SW2d 673, 5 ALR2d 1264, opinion by Justice Gailor, held that statutes which repeal or amend former laws by implication are not within a constitutional requirement that reference must



"My client is just a bad cook—she did not deliberately poison her late husband!"

be made in the caption or body of an act of the legislature to former laws thereby repealed or amended.

The annotation in 5 ALR2d 1270 discusses "Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication."

Succession Taxes — *affect of specifying price at which property must be sold.* The U. S. Circuit Court of Appeals for the Eighth Circuit in Spitzer v. Commissioner, 153 F2d 967, 5 ALR 2d 1114, opinion by Circuit Judge Riddick, held that stock in a corporation, all of which was held by its three executives, is subject to an agreement that on the death of any one of them, or retirement without consent of the others, his stock shall be purchased by the corporation or the other stockholders at its book value, or the corporation liquidated, as the surviving executive stockholders may elect, while a factor to be considered in fixing, for Federal gift tax purposes, the value of a gift of stock made by a stockholder while still active in the business, is not controlling.

The annotation in 5 ALR2d 1122 discusses "Valuation of property for purposes of estate, succession, or gift tax as affected by contract or by law specifying price at which property may or must be sold, purchased, or offered."

Succession Taxes — *time of rate of tax.* The Montana Court in Re Kohrs, — Mont —, 199 P2d 856, 5 ALR2d 1046, opinion by Justice Metcalf, held that the inheritance tax imposable in respect to property transferred in trust, inter alia, to pay the income to the grantor of the trust during her lifetime, with remainders over, is to be computed at the rate in force at the transferor's death rather than at the rate in force when the trust was created.

The annotation in 5 ALR2d 1065 discusses "Time as of which rate of tax applicable to transfer in contemplation of death, or to take effect on death, is determined."

Taxation — *underassessment of property.* A question which arises in every practice is discussed in Anne Arundel County v. Buch, — Md —, 58 A2d 672, 5 ALR2d 569. The opinion written by Justice Henderson holds that a taxpayer is entitled to a hearing before the county commissioners on the underassessment of property of other taxpayers, under statute giving any taxpayer the right to a hearing as to any assessment or increase, reduction, or abatement of any assessment.

The annotation in 5 ALR2d 576 discusses "Who may complain of underassessment or nonassessment of property for taxation."

Case and Comment
THE LAWYERS' MAGAZINE—ESTABLISHED 1894
AQUEDUCT BUILDING, ROCHESTER 3, N. Y.

GEORGE R. BUNDICK, *Editor*
GEORGE H. CHAPMAN, *Business Manager*

Advertising Representatives
NATIONAL PUBLISHERS REPRESENTATIVES, INC.
New York 17, N.Y., 114 East 47th Street, PLaza 3-5171 • Chicago 5, Ill., 59 East Van Buren Street, Wabash 0152 • Los Angeles 28, Calif., 6605 Hollywood Blvd., Hempstead 3171.

¶ Case and Comment is published bi-monthly by The Lawyers Co-operative Publishing Company, Rochester 3, New York, and Bancroft-Whitney Company, San Francisco 1, California. The publishers are not responsible for the personal views of the authors of signed articles. Their publication is not to be deemed an indorsement of any position taken on any controversial question.

Taxpayer's Action — *counsel fees in.* The South Carolina Court in Shillito v. Spartanburg, 214 SC 11, 51 SE2d 95, 5 ALR2d 863, opinion by Justice Fishburne, held that an attorney's fee may properly be awarded to a taxpayer out of money raised by an illegal municipal tax which, as a result of his attack on the legality of the tax, the municipality has been ordered to retain in its general fund.

The subject of the annotation in 5 ALR2d 874 is "Allowance of counsel fees in taxpayer's action."

Time — *computation of one's age.* An interesting question is discussed in Nelson v. Sandkamp, — Minn —, 34 NW2d 640, 5 ALR 2d 1136, opinion by Justice Matson. It was there held that in general, the common-law rule for the computation of time is to exclude the first and include the last day; but in computing a person's age, the day upon which that person was born, even though it may have been on the last moment thereof, is included, and he therefore reaches his next year in age at the first moment of the day prior to the anniversary date of his birth.

The annotation in 5ALR2d 1143 discusses "Inclusion or exclusion of the day of birth in computing one's age."

Unemployment Insurance — *recovery of erroneous payments.* In Tube Reducing Corp. v. Unemployment Compensation Commission, — NJL —, 62 A2d 473, 5 ALR2d 855, opinion by Justice Heher, it was held that an employer against whose account payments of unemployment compensation are chargeable has sufficient interest in the subject matter to warrant the issuing of a certiorari at his instance to review the determination of the Board of Review of the New Jersey Unemployment Compensation Commission absolving an employee from the obligation to repay benefits to which he was not entitled.

The title to the annotation in 5 ALR2d 860 is "Repayment of unemployment compensation benefits erroneously paid."

Witnesses — *inference from failure to call.* It was held in

Ellerman v. Skelly Oil Co., — Minn —, 34 NW2d 251, 5 ALR 2d 886, opinion by Chief Justice Loring, that permitting plaintiff's counsel, over objection, to argue to jury that a defendant's failure to produce as a witness a former employee of the defendant gave rise to a presumption that the testimony of the witness would have been unfavorable, held to be prejudicial error.

The title to the annotation in 5 ALR2d 893 is "Relationship between party and witness as giving rise to or affecting presumption or inference from failure to produce or examine witness."

Witnesses— *waiver of privilege.* The Utah Court in State v. Byington, — Utah —, 200 P2d 723, 5 ALR2d 1393, opinion by Justice Wade, held that under the constitutional privilege against self-incrimination, evidence of testimony given by the defendant in a former contempt proceeding is not admissible in a perjury prosecution against him based on such testimony, where in the contempt proceeding the defendant was not represented by counsel, refused to take the stand as a witness, was called to the stand by the judge and examined by the judge and opposing counsel without knowledge or advice of his right to refuse to give self-incriminating testimony and without asserting the privilege.

The annotation in 5 ALR2d 1404 discusses "Use in subsequent prosecution of self-incriminating testimony given without invoking privilege."

Temptation

The cards of thanks I get paid for running sometimes have exceptional reader appeal. This one appeared recently: "In appreciation—I wish to thank the Lord that the mad dog which Mr Blank killed last wk did not bite me as he passed within 3 ft of me. Signed, Mrs So and So." Response to the ad included another Card of Appreciation, ostensibly submitted for publication, which read: "In Appreciation—I wish to thank the Lord that I didn't bite Mrs So and So when I passed within 3 ft of her the other day. Signed, The Mad Dog."—*Frank Zeiske,* Belleville (Tex) Times

Predicting Supreme Court Decisions

By JULIUS HENRY COHEN
of the New York City Bar

Condensed from Syracuse Law Review, Spring, 1949

WE RECALL a leading New York lawyer who appealed a very complicated case to the United States Supreme Court. He consulted the late John G. Johnson of Philadelphia, as the best lawyer in the country to argue the case. After going over the facts carefully, Mr. Johnson said, "You are right in principle, but the Court will probably decide against you." Another lawyer was retained to argue the case. When the decision came down, it was almost precisely in line with what Johnson had predicted.

Because of his national reputation for objectivity and detachment, Johnson was often consulted in difficult situations. Once when a great merger was under consideration, a leading banking firm wanted Johnson's opinion. He was then in Norway. The lawyers sent a long cablegram asking whether the merger was *possible*. Johnson's reply was laconic: *"Merger possible, prosecution certain."*

How, then, may American counsel advise today? He is bound to be an "I Predicter." But unlike the commentators and pollsters, the lawyer's predictions are fraught with serious penalties for the client, if he be wrong. His client may go to jail, or be subject to treble damages under the Sherman Anti-Trust Law. If he is regular counsel for the enterprise, he quickly learns that *his client wants to do what he wants to do, and sees no reason why he should not do it.* Quite apart from the matter of continuing his job, there is the natural desire of the lawyer to please his client. Obviously, there is also the pride of standing by his own decisions. But does regular counsel—who is so close to the client as almost to become his other self—do justice to his client by refraining from calling in an independent, outside adviser? The medical profession is more cautious. The most successful family doctors insist upon calling in outside advice to

Reprints of the entire article may be obtained at 25¢ a copy from the Syracuse Law Review, 400 Montgomery Street, Syracuse 2, New York.

"check"—especially where an operation is involved.

This means that American counsel must constantly study current events: not only the opinions of the Court, but the newspapers and magazines. He must follow the debates in Congress. He must read the articles which form the basis for possible legislative action. In short, he must have the knowledge and wisdom to qualify as a statesman. While he may not get in the thick of the legislative battles, he must know what pressure groups are doing in order to appraise their strength.

This, you will say, is a large order. It calls for a totally different training than was given in the laws schools in the day this writer attended. Today, "training in citizenship" is part of the training in law. No lawyer is adequately equipped to give sound opinions until he has had a very considerable and varied experience in public affairs.

We come to the conclusion that to prophesy what the United States Supreme Court will do in a given case requires knowledge of the life and experience, the training and education, and the genes of the blood stream of the ancestors of each of the Justices. If, in addition, he were a known candidate for the Presidency, or was ambitious to become Chief Justice, predicting counsel would have to take account of this factor also. Counsel would also have to consider the likelihood or new appointees and their probable ancestry, experience, and ambition.

In the days of Sutherland, Butler and McReynolds, there was a reasonably sure footing upon which the decisions of at least three judges on the bench could be forecast. But this was before the "court packing" drive of Franklin D. Roosevelt. It is true that the American Bar and American public opinion defeated the plan of the President, but the consequences of his campaign are only now fully coming to effect. Despite an earlier revolt of a Chief Executive against the restraints imposed by the United States Supreme Court, Theodore Roosevelt's movement for judicial recall, the tradition survived that the Court remain outside the hurly-burly of politics. Oliver Wendell Holmes could decide the *Northern Securities* case as he felt it should be decided, despite the expectations of Theodore Roosevelt.

However, the drive of Franklin D. Roosevelt to change the personnel of the Court had back of it not only his political determination, but also a broad, general discontent with the rigidity of Supreme Court decisions. The New Deal laid stress on "changing economic conditions" and "new social concepts." Respect for the Court declined. Chief Justice Charles Evans Hughes was convinced that something had to be done to re-

establish the Court in public esteem. It was either "bend" or "break," and so came the reversal in the *Minimum Wages for Women* case. By the reversal of one judge (Mr. Justice Roberts), the Court put itself in harmony with the sentiment of the country. Yet it reversed settled law. It met the social and economic needs of the country. But we emphasize that the Court was influenced by *lateral pressure*. Ever since the decision in the *Minimum Wages for Women* case, the Court's desire to win back the confidence of the people has caused it to conform to what it *believed* were the *desires of the people.*

What, then, are the qualities necessary to equip adequately a mature lawyer to give sound advice to clients? First of all, he should be independent and detached, free from any prior association that consciously or subconsciously affects his judgment.

Advisory counsel must, of course, read a great deal. He must read critically all the court opinions—minority as well as majority opinions. He must keep up with current events through the newspapers and journals and books that contribute significantly to thinking on economics and politics. He must examine closely the history and background of the case given to him for his opinion. He must consider what the court of last resort is likely to do in the existing climate of public opinion. And he must never forget that the climate of opinion changes from time to time in the light of the economic situation as it then appears.

Advisory counsel will be guided accordingly to a sensitive appraisal of all the lateral pressures which are conscious or subconscious elements affecting the thinking of the justices. In this process, advisory counsel need not be discouraged and throw up his task as hopeless. It is not as formidable as it would have seemed only a year ago.

Neighborly Acts

While one may stand by his neighbor's fence on his own lot, and breathe across it over his neighbor's land, and may permit the smoke and smell of his kitchen to pass over it, and may talk, laugh, and sing or cry, so that his conversation and hilarity or grief is heard in his neighbor's yard, he has no right to shake his neighbor's fence, or to throw sand, earth, or water upon his neighbor's land in ever so small a quantity. Hennessey v. Carmony, 50 N. J. Eq. 616, 25 Atl. Rep. 374, per Pitney, V. C.

Liability and the "Deep-pocket" Defendant

by ROGER W. PERKINS
of the Waterville (Maine) Bar

ONE WHO seeks redress at law does not make out a case by showing, without more, that there has been damage to his person or property. Nor should he be found to establish legal liability upon the part of a corporate defendant by pleading, without more, its "ability to pay." In fact, there are many instances of injuries to person and property for which the law furnishes no relief; instances in which the misfortune of the plaintiff is not attributable to any fault on the part of the defendant, and the injury sustained is, in the Latin phrase, "damnum absque injuria" (injury without legal wrong).

The primary wrong upon which a cause of action for negligence is based consists in the breach of some duty on the part of one person to refrain from causing damage to another. At the most, this wrong consists in the breach of a duty on the part of A to protect B against loss or injury, the proximate result of which is an injury to B—and, generally, to recover for which injury, it should be further noted, B must, himself, show he was in the exercise of due care. These elements of duty, breach, and damage are essentials of actionable negligence.

This generation has witnessed the development of new and entire fields of liability. Yet more serious, however, is the recent melancholy evidence of a current and strained philosophy which blurs the outlines of our established law in this regard.

Perhaps, generally, the shadow of social engineering lies rather heavily on the existing law of civil wrongs or Torts, so-called.

One element contributing to this legal abandon is readily observed when the case problem is dealt with as one of "allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is placed upon the party best able to shoulder it. The defendant, although he departs in no way from ordinary standards, must proceed 'at his peril', and his conduct is regarded as tortious, not because it is morally or socially wrong, but because as a matter of social engineering

the responsibility must be his."

This theory appears to be based upon the capacity to absorb or avoid loss. More specifically, the defendants in tort cases to a large extent are public utilities, industrial corporations, insurance companies (sought to be assessed through those whom they insure), commercial enterprises, etc. Thus, a comparatively recent count of 279 cases in one jurisdiction bearing on the issue of "proximate cause" revealed the following list of defendants: railway and street railway companies 129, other public utilities 24, manufacturers, industrial concerns and public stores 54, municipal corporations 19, automobile drivers 20, other defendants (including several physicians, individual employers, charitable corporations and others who might well have carried liability insurance) 33.

Beyond what has been stated, today's most alarming consideration is of the sentiment displayed by a society from whose ranks parties emerge, witnesses appear, juries are drafted, and spectators collect in the course and cause of litigation. This uniformed citizenry is heard to adopt a false though temporarily comfortable philosophy, born out of the influence of social and political expediency. These people, regardless of the law, are seen to apply their own concept of justice under the lamp of social consciousness.

Some weeks following the trial of a tort action arising out of a motor vehicle accident, by which verdict the plaintiff's fortune was substantially increased, the defendant was approached by one of the jurors who volunteered the explanation, apologetically, "to tell the truth, mister, while we didn't find any evidence of duty or blame in your accident case, . . . in our own minds, we all felt you were insured."

Then, in variation, yet nonetheless typical, there was the instance of the "insured," a physician, whose parked automobile and the car of another had been damaged in collision through the careless operation of the other motorist. After a heated interview, this medical man threatened his insurance agent, "Regardless of who was to blame, I shall drop my policy if your company doesn't pay the other fellow's claim. As it so happens," he continued, "I enjoy a 'doctor-patient' relationship with that man which I do not intend to have interrupted by legal nonsense!"

The groundless, yet staggering injury claims prosecuted in the courts by so many indignant and agonized petitioners who have slipped and fallen, through their own sheer neglect or indifference, within and without the premises occupied by an otherwise successful merchant or by a modern hotel or theatre, while tragi-comic, are too frequent and notorious to illustrate.

Our discouraging commentary need only be concluded with a graphic example of this current and curious philosophy in the character of general bystander reaction to the report of a recent railroad crossing accident.

The claimant—and plaintiff in this instance—together with his wife and small children, motoring one evening in the course of a pleasure drive, came to a railroad crossing. Upon earlier occasions, claimant had crossed at this point en route to work. The safety devices here in the form of automatic warning lights and signal bells were at this time admittedly in operation, further announcing the whistling approach of an evening passenger train passing on its scheduled run. Impatient with the idea of delay, the driver of the car set his jaw in a grim smile and raced forward and upon the crossing in the path of the oncoming locomotive. Thereupon, a horrible screeching and crash was accompanied by twisting steel and the dizzy catapulting of human bodies. Some distance beyond the crossing all motion ceased as suddenly as it had begun. Dazed silence was broken by creaking and crying noises. A crowd collected, in alarm and by emergency assignment. Miraculously, no one was killed. One little child was uninjured, having in some manner been thrown clear. Her little sister half-ran for a distance along a length of track in nervous disorder, then raced back again, her shrill screams piercing the night air. She was later found to have sustained a type of concussion about her head. The mother's forehead and shoulder were bleeding profusely from jagged cuts received at the impact of her blow against the windshield and the father suffered compound fractures of the left arm and leg. To the newsphotographer's delight, the scene was easy to capture as the view was plain and clear, and on the following morning this accident was reported with vivid journalism.

On these facts, a college acquaintance was heard to advocate some weeks later, "I hope they collect plenty, because they surely need it." When questioned concerning the facts, this person curtly announced, "I know all that but I don't care, he's only an instructor at the university and that doesn't pay very well. I expect his medical bills will be terrific!"

Our leading texts point out that the law is anything but static, and the limits of its development are never set; and when it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy. Our courts continually hold the law is progressive and expansive, adapting itself to the new relations

and interests which are constantly springing up in the progress of society. But, they point out, this progress must be by analogy to what is already settled.

Liability for negligence must, of course, be predicated upon a causal connection between the negligence alleged as a wrong and the injury of which complaint is made. Concisely, liability is neither created nor enlarged purely by the occurrence, nature and extent of personal injury or property damage. Moreover, a cause of action for negligence depends not only upon the defendant's breach of duty to exercise care to avoid injury to the plaintiff, but also upon an injury suffered by the plaintiff as a consequence of the violation of duty.

The rule which has been stated and applied more often than any other test of proximate cause, is that which determines an injury to be the proximate result of negligence only where the injury is the natural and probable consequence of the wrongful act or omission. The purpose of testing proximate cause according to the natural and probable is to apply the common experience of mankind to the situation and to preclude the assertion of liability—regardless of the identity of the defendant—for a consequence of negligence which, according to such experience does not follow naturally and reasonably from the negligence.

Logically, therefore, the question of liability is always anterior to the question of the measure of the consequences that go with liability.

A society is only democratic which searchingly inquires on these occasions, "Was the loss or injury caused under circumstances creating a legal liability on the part of this defendant?"

Right to Equal Enjoyment

Power given to a city by statute to take land for "any street, lane, avenue, alley, public square, or other public grounds" does not include power to take land for a city prison, as the statute contemplates the taking of land which all persons would have an equal right to enjoy. East St. Louis v. St. John, 47 Ill. 463.

Inflammatory Argument

A judgment for the plaintiff, in an action for negligence, will be reversed because of a declaration by the plaintiff's counsel that "if the railroad company were charged with the killing of Christ, . . . they would come into court and plead that Christ was guilty of contributory negligence." St. Louis, etc., R. Co. v. McLendon (Tex. Civ. App. 1894), 26 S. W. Rep. 307.

Diary of First Year Law Student

By RICHARD WINCOR
of the New York City Bar

Reprinted from Harvard Law School Record, March 23, 1948

NOVEMBER 1—Gosh, I still have to pinch myself to believe I'm really here. The assignments don't cover enough ground, so I'm taking Evidence, Conflicts, Creditor's Rights and Taxation along with my regular courses. Of course they are third-year subjects, but the Law to me is a vast tapestry that must be seen whole, as an integral unit. Making *Law Review* will be no problem. The other chaps seem to lack completely what I call the "Big Picture." They waste time quibbling over details of assigned cases, and by reducing the litigants to letters, calling them A, B, X, and such dreary stuff, they lose utterly the drama that exists in the human element of little people like ourselves caught up in something bigger than any of us, to coin a phrase. What a rotten shame. I'm not reading any cases in terms of A, or B, or X. The true way will be to see the Big Picture, and actually hear the cry of the vendor extolling his wares; to envision the bargaining of parties, the grantee stepping for that first breathless moment upon Blackacre, knowing it to be his castle; the fatal pride of the tortfeasor, the inner thoughts of flesh and blood people in the cases: Meadows, Goldstein, Schwimmer. This is the Law as it will be for me; no alphabet, but a live thing.

And what a brave new world of commerce stands revealed in these old pages! Exotic cargoes I had never heard of: Manila hemp, pipes of brandy, and particularly guano, which somehow captivates the imagination.

The Law is not facts, and it is not dry justice. It is a new world of faery and romance. The examination in Criminal Law will be a challenge for those views, and I shall welcome it.

FEBRUARY 22—There has been all too little time for keeping up this diary. Today, however, I learn that I made a 12 on the Criminal Law exam, which seems a bit low but has at least the virtue of stamping my thoughts as removed from the average. Perhaps I cited too

much of the Kinsey Report. At any rate things will be different on the spring exams, where the instructors will have the chance to know me better.

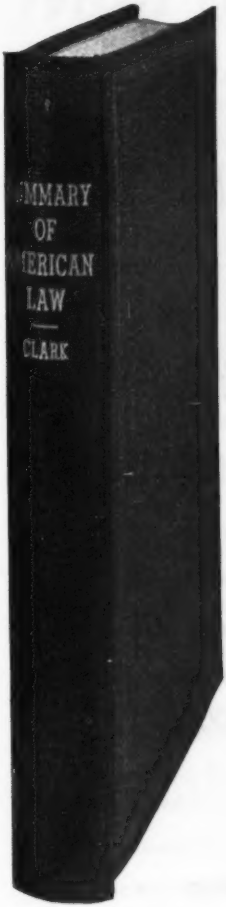
A most delightful girl has come into my life. Her name is Renvoi and she goes to Portia Law School. Though somewhat gnome-like in appearance, she has an astute mind, and many are the sandwich dates I have enjoyed with her in the stacks. Renvoi shares my enthusiasm for the topic of guano, and with the second Ames trial near at hand I hope to get a case connected with that subject. I hope also to get through this Ames case without the fainting spell and nosebleed that overtook me in the first trial and prevented my winning a prize.

It seems hard to realize that the first year is so far along. Some of the chaps are worried about not making the grade, but I myself can hardly get excited about examinations. First things first, to coin a phrase. And for me, "first" things are those that make for understanding of the basic fabric of the law. Take Real Property for example. The instructor is a perfectly nice sort, prepped at a good school, belongs to the right clubs, and appears pretty sound. But all he can make out of Real Property is A and B again. What a rotten shame. In the spring perhaps, I may show him that the law of land is a study in mediaeval lore, and that the important things are not the mortgages and the purchase price, but the now silent banquet halls, the minstrels, and the proud barons and dead ladies.

JULY 15—Gosh, I still have to pinch myself to believe I'm really here. It's hard to realize that this is Seagull's Nook, one of the most famous guano islands off the coast of Chile. Quaere, whether Renvoi's father would have gotten me this peachy job if he had known that my final average at the Law School was 10.

But it makes no difference now. I am here, bubbling with health, and I have found myself after a little groping. In that sense, the year of Law was certainly no waste. Furthermore it made me sharp. For example, when they put this precious cargo in sacks I shall know better than to break bulk if I am the bailee.

Yes, this is the life. Away on an exotic island, listening to the seagull's cry, and gathering each day this precious treasure until the sun, like a copper ball, declines in the west. Onward to silken Samarcand and cedared Lebanon.



It's Different

THIS MOST COMPREHENSIVE SINGLE-VOLUME WORK IN MANY YEARS

CLARK'S SUMMARY of AMERICAN LAW

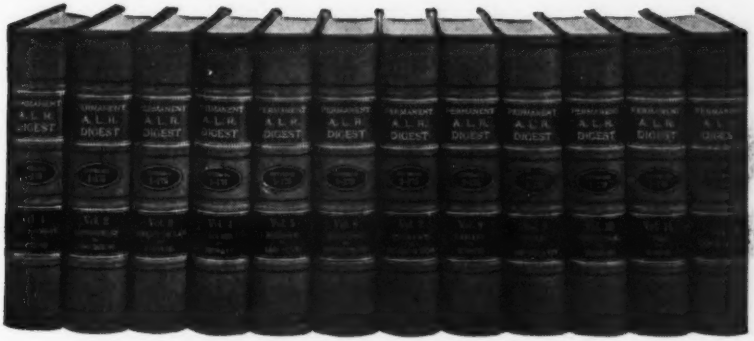
WITH INTRODUCTION BY
DEAN ROSCOE POUND

- Thirty-one subjects covered.
- The quickest source of refresher information.
- A sure way to ALR annotations, American Jurisprudence, and hundreds of law review articles in fifty-one law reviews.

We have added an appendix to Clark's Summary of American Law consisting of a Law Quizzer which will be extremely valuable to the student preparing for his law school or bar examinations. The price remains at $7.50.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
Rochester 3, ***New York***

Now UNDER ONE ALPHABET



A New And Permanent ALR Digest

The long desired, consolidated, permanent Digest for ***American Law Reports*** is here. It replaces the six separate Digests issued periodically during the thirty-year period covered by volumes 1–175 ALR.

The continuing nature of ALR during that period made it impractical heretofore to consolidate these many separate Digests. Now such a consolidation is not only practical, but virtually imperative so that you may get the maximum use from both the cases reported in full and the famous annotations in ALR.

This truly modern, full paragraph Digest has many innovations to meet the present-day need for greater speed and accuracy in research.

Generous allowances are made to owners of the former ALR Digest.

If you have not subscribed to this effective new tool, it will be to your advantage to contact either publisher.

THE LAWYERS CO-OPERATIVE PUBLISHING CO., ROCHESTER 3, N. Y.

BANCROFT-WHITNEY COMPANY, SAN FRANCISCO 1, CALIF.